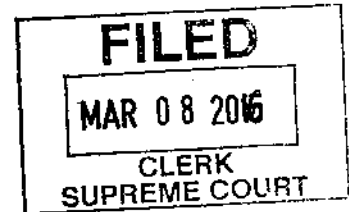


COMMONWEALTH OF KENTUCKY  
SUPREME COURT OF KENTUCKY  
CASE NO. 2015-SC-000114-D



THE ESTATE OF CHRISTINA WITTICH,  
by and through Judith Wittich and Frederick  
Wittich in their duly appointed capacities as  
Co-Adminstratrix and Co-Administrator

APPELLANTS

v.

COURT OF APPEALS NO. 2009-CA-002378  
FAYETTE COUNTY CIRCUIT COURT  
CASE NO. 08-CI-4294

MICHAEL JOSEPH FLICK


APPELLEE

APPELLANTS' REPLY BRIEF

CERTIFICATE OF SERVICE

I hereby certify that I have mailed a true and correct copy of the foregoing to the following by way of U.S. Mail on this the 7<sup>th</sup> day of March, 2016, and the original and 10 copies were filed in accordance with CR 76.40(2) by overnight Federal Express mail with the Supreme Court of Kentucky, Clerk of Supreme Court of Kentucky, Capital Building, Room 235, 700 Capital Avenue, Frankfort, Kentucky 40601; Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; Jennifer Zeigler Hoerner, PO Box 34192, Lexington, Kentucky 40588; Honorable Thomas L. Clark, Fayette Circuit Court, Fayette County Courthouse, Room 511, 120 Limestone, Lexington, Kentucky 40507.

Respectfully submitted,

  
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## REBUTTAL ARGUMENT

### A. The Court Of Appeals Impermissibly Reversed The Circuit Court On An Issue That Was Not Presented To, Or Decided By, The Circuit Court.

Flick concedes he did not argue either at the Circuit Court or Court of Appeals that the *DiGiuro* decision was not binding on the trial court or that the Court of Appeals should reconsider the validity of the *DiGiuro* because it was wrongly decided. Indeed, Flick concedes he only argued that *DiGiuro* created a narrow exception that tolled the limitations period for bringing a wrongful death claim. Nonetheless, Flick contends that the Court of Appeals did not exceed its authority in reversing the Circuit Court's decision on the basis of an issue that was not presented for review, without providing the parties with an opportunity to brief and argue the issue, by simply contending that questions of law are subject to a *de novo* review.

Flick's summary argument that the Court of Appeals had plenary authority to reverse the Circuit Court's decision merely because a *de novo* review governs legal issues is contradicted by the case law. "[I]t is the accepted rule that a question of law which is not presented to or passed on by the trial court cannot be raised for the first time [on appeal]." *Fischer v. Fischer*, 348 S.W.3d 582, 589 (Ky. 2011) (quoting *Hutchings v. Louisville Trust Co.*, 276 S.W.2d 462, 466 (Ky. 1955)). As made abundantly clear in *Fischer*, "when an appellate court determines to reverse a trial court, it cannot do so on an **unpreserved legal ground** unless it finds palpable error<sup>1</sup> because the trial court has not had a fair opportunity to rule on the **legal question**. . . . [I]t is the responsibility of the movant to put a **legal ground** before the court, because it is, after all, his motion, and he bears the burden of proof." *Id.* at 590 (emphasis added).

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<sup>1</sup> Neither the Court of Appeals nor Flick relied on palpable error on the part of the Circuit Court in following *DiGiuro* as a basis for reversing the Circuit Court's decision.

In both the Circuit Court and the Court of Appeals, Flick conceded the applicability of the *DiGiuro* decision to the statute of limitations issue but asserted that the decision did not apply to the facts before the Courts. Where, as here, a party concedes the validity of the governing law, the appellate court errs by revisiting the issue. *See, e.g., Regional Jail Auth. v. Tackett*, 779 S.W. 2d 225, 228 (Ky. 1989) (validity of jail authority not an issue subject to review by the appellate court where validity was conceded at trial court); *Harrison v. Leach*, 323 S.W.3d 702, 706 (Ky. 2010) (Court of Appeals could not decide case based on standing where standing was not an issue in the trial court).

Contrary to Flick's assertion, *de novo* review does not result in the Court of Appeals having unlimited authority to decide a case on any legal issue that was not presented for review. Such an argument, in fact, is precluded by this Court's decision in *Fischer*. In *Fischer*, the Court summarized: "Similarly a trial court's interpretation of the law is *de novo*, meaning it is entitled to no deference by the appellate court, **but that standard of review does not mean that the appellate court is free to then address any and all legal issues that might affect the case. Rather, the court is bound to address only the question of law presented before a trial court may be reversed.**" *Fischer*, 348 S.W.3d at 590 (emphasis added).

The Court of Appeals exceeded its permissible scope of review in reversing the decision of the Circuit Court on an issue that was not properly before the Court. The Court of Appeals' decision, therefore, should be reversed and the judgment of the Fayette Circuit Court reinstated.

**B. The Court Of Appeals Erred In Ignoring The Effect Of The Supreme Court's Affirmance of the *DiGiuro* Opinion In Determining That *DiGiuro* Was Persuasive Authority.**

The original Court of Appeals decision in *DiGiuro* was designated to be published pursuant to CR 76.28(4)(a). That provision further provides that when a motion for discretionary review is filed, the opinion of the Supreme Court shall not be published until the Supreme Court rules on the motion for discretionary review. Where a motion for discretionary review is granted, the decision of the Court of Appeals shall not be published unless otherwise ordered by the Supreme Court.

Implicit in CR 76.28(4)(a) is the premise that when the Supreme Court accepts discretionary review, a subsequent opinion of the Supreme Court will take the place of a Court of Appeals' decision in official reporters. Only six justices decided *DiGiuro* resulting in a three to three split. By operation of Supreme Court Rule 1.020(1)(a), the decision of the Court of Appeals was affirmed by Order. The Supreme Court did not issue an Opinion.

CR 76.28(4)(a) mandates that every opinion, on its face, be designated as to be published or not to be published. CR 76.28(4)(c) provides that opinions that are not be published shall not be cited or used as binding authority in any court in the Commonwealth. The *DiGiuro* opinion was designated to be published and, therefore, was intended to be binding authority in the Commonwealth. The opinion was affirmed by the Supreme Court by operation of Supreme Court Rule 1.020(1)(a). The Court of Appeals gave no consideration to its prior conclusion that *DiGiuro* should be binding precedent and the effect of the affirmance of *DiGiuro* by this Court in concluding that *DiGiuro* was persuasive authority only.

The Court of Appeals erred in refusing to follow and apply its prior decision in *DiGiuro*. The opinion was not “unpublished by order of the Supreme Court” as stated by the Court of Appeals. As noted by the Fayette Circuit Court, the *DiGiuro* opinion was never depublished. Accordingly, the Fayette Circuit Court correctly followed precedent in determining that the Estate’s cause of action accrued on the date Flick was convicted. The Court of Appeals’ decision to the contrary should be reversed.

**C. The Court Of Appeals Erred In Determining That The General Assembly Had Clearly Addressed The Limitations Period Thereby Precluding The Court From Relying On Policy Considerations To Toll The Limitations Period.**

No limitations period is prescribed in KRS 411.130(1) for initiating a wrongful death action. The one year limitations period contained in KRS 413.140(1)(a) for maintaining a personal injury action has been judicially imposed under the reasoning that “[d]eath is simply the final injury to the person.” *Conner v. Whiteside*, 834 S.W.2d 652, 652 (Ky. 1992).

The limitations period for bringing a wrongful death action was mandated through the inherent power of the judiciary almost 25 years ago. The General Assembly has acquiesced to the Court’s determination. As a judicially imposed limitations period, it is within the inherent authority of the Courts to create exceptions to the accrual of the limitations period. The Court of Appeals, therefore, erred in concluding that it could not rely on the “compelling policy considerations” underlying the *DiGiuro* decision in tolling the limitations period until the date of conviction in wrongful death cases arising from a murder.

A cursory review of the *DiGiuro* opinion establishes that policy considerations mitigate in favor of a tolling of the limitations period in murder cases. Strict adherence to

an arbitrary one year limitations period from the date of appointment of a personal representative would not further the goals of sparing the courts “from litigating stale claims after memories have faded, witnesses have died or disappeared and evidence has been lost.” *Mills v. Habluetzel*, 456 U.S. 91, 102 (1992) (quoting *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945)). Rather, as noted in *DiGiuro*, delaying the running of the statute in a murder case until the finality of the criminal proceedings could operate to benefit the accused because if he or she was found not guilty that finding could result in dismissal of the civil proceeding. Alternatively, where the defendant ultimately pled guilty, “he would be hard pressed to challenge a civil matter where the burden of proof is lower.” *DiGiuro*, Opinion at 16.

The preeminent policy in the Commonwealth of Kentucky is that victims are entitled to redress for their injuries. The Court of Appeals herein determined that compelling policy arguments, as set forth in its prior opinion in *DiGiuro*, supported tolling the limitations period in wrongful death cases arising from murder. Accrual of the limitations period on the date of conviction would provide universal certainty to litigants and courts and avoid any hindsight analysis of the strength of the evidence against an accused at any point in the criminal proceeding, thereby avoiding massive litigation regarding accrual. As noted by the Court of Appeals, tolling of the statute of limitation until the date of convictions would actually benefit the criminal defendant.

The public policy mandating the right of victims to redress should prevail over the rights of a criminal who pleads guilty to, or is convicted of, murder. Accordingly, the Court of Appeals erred in determining that the Estate’s claims herein were barred by the statute of limitations.



**D. The Legislature Presumably Adopted *DiGiuro* In Amending KRS 413.140 In 2013.**

It is a well-established tenet that in amending a statute, the Legislature is presumed to know not only the law but the interpretation given its prior enactments by the courts. *Combs v. Kentucky River Dist. Health Dep't*, 194 S.W.3d 823 (Ky. App. 2006); *Kentucky Real Estate Comm'n v. Milgron*, 197 S.W.3d 552 (Ky. App. 2006). If the Legislature disputed *DiGiuro*'s conclusion that the statute of limitations could be tolled in wrongful death cases arising from murder, "it had ample opportunity to amend the statute" to clarify that all wrongful death actions are governed by the one year limitations period in KRS 413.140. *Smith v. Smith*, 56 S.W.3d 420, 426 (Ky. 2001).

Flick does not even attempt to dispute this well established legal tenet opting, instead, to speculate that it is "possible" other reasons existed that the Legislature has not addressed the issue and stating that Movants have not provided "evidence" that the Legislature was considering the statute as it related to wrongful death actions. A legal presumption, however, negates any requirement that a party present "evidence" as to what the Legislature was thinking. The Court presumes that the Legislature is knowledgeable of the judicial construction of a statute. *Smith*, 56 S.W.3d at 426. The Legislature's amendment of KRS 413.140 should operate as an implicit adoption of *DiGiuro*'s tolling of the limitations period until the date of conviction in wrongful death cases resulting from murder.

**E. Flick Has Failed To Provide A Substantive Legal Basis For Asserting That *DiGiuro* Should Not Be Prospectively Applied.**

The pertinent authority that existed on the date that Flick brutally murdered Christina Wittich, the dates on which he was arrested, arraigned, indicted and convicted

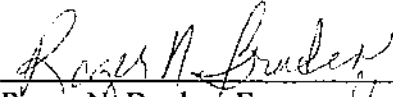
and that date on which the Estate's Complaint was filed held that a claim for wrongful death resulting from murder would be timely as long as it was filed within one year of the date of conviction. This is not disputed. It is also not disputed that the Court has the inherent power to give a decision prospective or retrospective application. *Hagan v. Farris*, 807 S.W.2d 488, 490 (Ky. 1991). Prospective application is warranted in circumstances in which parties have acted in reliance on the law as it existed and a contrary result would be unconscionable.

Flick makes no effort to demonstrate through citation of legal authority that prospective application of the *DiGiuro* decision would be improper. Although Flick generally avers that "[t]t was not settled that *DiGiuro* made any significant changes to Kentucky law," it cannot go without notice that the allegedly unsettled issue of the appropriate statute of limitations was not clear to Flick at the trial court proceedings or while the matter was pending before the Court of Appeals. Where, as here, reversal resulted based on an unpreserved error which was raised *sua sponte* by the Court of Appeals, manifest injustice would result by giving the decision retroactive application. *Burns v. Level*, 957 S.W.2d 218, 222 (Ky. 1997).

### CONCLUSION

The Opinion of the Court of Appeals should be reversed and the Judgment of the Fayette Circuit Court reinstated.

Respectfully submitted,

  
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